Supreme Court, U.S.
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No. 99-1709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION

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May 30, 2000

Both respondent Boehner and the Government agree with petitioner that this case presents a First Amendment question of exceptional importance on which the D.C. Circuit and the Third Circuit are divided. The only disagreement among the parties, in fact, is whether the Court should grant this petition or the forthcoming petitions on the other side of the circuit split in the *Bartnicki* case. The Government, a petitioner in *Bartnicki*, urges the Court to hold this case and grant *Bartnicki* instead. This Court, however, should not allow the Government to cherry-pick the particular case in which it defends the constitutionality of a federal statute. For the reasons set forth below, as well as those advanced by Rep. Boehner, the Court should grant the petition in this case.

At the outset, it is important to keep in mind that the Government is not a disinterested observer in either this case or *Bartnicki:* it is a *party* in both cases, having intervened below to defend the constitutionality of the challenged statute as applied in each case. Needless to say, the Government as a party litigant has a strong interest in persuading this Court to grant *certiorari* in the case deemed to optimize its chances of success. There is, of course, nothing wrong with that: the Government has not only the power but the duty zealously to defend the statute. But the fact that the Government prefers the *Bartnicki* case to this one is hardly a reason for this Court to choose the one over the other.

It is not surprising that the Government seeks to avoid defending the constitutionality of the statute as applied in this case rather than in *Bartnicki*. As explained in the petition, this case presents about as stark an issue of free speech as can be imagined: one public official is seeking to punish another public official for allegedly disclosing a conversation that revealed apparent official misconduct by yet another public official. Rep. Boehner does not allege that the intercepted conversation revealed any private or embarrassing facts about him, and seeks only statutory and punitive (not compensatory) damages. As the district court put it, Rep. Boehner "seeks less

to strike a blow for his personal privacy rights than he does to fire a salvo in the partisan battle between rival groups in the House of Representatives." Pet. App. 58a. The First Amendment in no way tolerates the punishment of speech under these circumstances.

Nor it is surprising that the Government seeks to avoid defending the rationale of the divided D.C. Circuit majority below. Judge Randolph's lead opinion rests on the theory that intermediate scrutiny is appropriate because this case involves conduct rather than speech. *See* Pet. App. 5a-7a. Judge Ginsburg's concurring opinion rests on the theory that intermediate scrutiny is appropriate because Rep. McDermott did not "'lawfully obtain'" the disputed information "within the intendment of that phrase in *Florida Star*," even though he concededly broke no law in obtaining that information. *See id.* at 32a (brackets omitted). The Government conspicuously declines to defend *either* of these theories. Rather, the Government asserts that intermediate scrutiny is appropriate because the challenged statute is a content-neutral law of general applicability. *See* Gov't Br. 12 (incorporating by reference arguments advanced at pp. 10-12 of the petition in *United States v. Vopper*, No. 99-1728).

Conveniently enough, the Third Circuit in *Bartnicki* expressly *accepted* the Government's legal theory "that intermediate scrutiny applies because the Acts are content-neutral." 200 F.3d at 121. The panel majority simply held that, as applied to the facts of that case, the statute could not survive even intermediate scrutiny. The *Bartnicki* dissent expressed a "general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents," and emphasized that "[w]here I part company with the court is in its *application* of intermediate scrutiny in this case." *Id.* at 130-31 (emphasis added); *see also* Gov't Br. 12 ("[T]he Third Circuit's *application* of intermediate scrutiny analysis is unsound.") (emphasis added).

Needless to say, the Government would much prefer to have this Court review the relatively narrow dispute in *Bartnicki* over the application of intermediate scrutiny rather than the fundamental and wide-ranging disagreement among *all three judges* on the D.C. Circuit panel below about the governing legal standards, including the appropriate level of judicial scrutiny. But that does not render *Bartnicki* "a better vehicle for this Court's review." Gov't Br. 13. The Government gives two reasons for that assertion, both of which are insubstantial.

First, the Government emphasizes that *Bartnicki* involves both media and non-media defendants, whereas this case involves only a non-media defendant. (Rep. Boehner chose not to sue *The New York Times* or any of the other newspapers that disclosed the contents of the disputed audiotape.) Not one of the judges below, however, gave any weight to that distinction, and this Court has soundly rejected it. *See* Pet. App. 26a n.20 ("It is good that our dissenting colleague believes the press has no greater First Amendment rights than anyone else. The Supreme Court agrees with him. So do we.") (citing, *inter alia*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)); Pet. App. 38a-39a (Sentelle, J., dissenting) ("I cannot think that the identity of the communicator can be a distinction of difference. . . . The First Amendment protections of speech and press extend to those who speak and those who write, whether they be press barons, members of Congress, or other sources.").[1] The Government itself has never suggested at any

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[1] Judge Randolph recognized that his dispositive speech/conduct distinction would not apply "to a newspaper who published excerpts from the tape—who, in other words, engaged in speech." Pet. App. 27a; *see also id.* at 7a (refusing to consider application of the speech/conduct distinction "to the newspapers who published the initial stories about the illegally-intercepted conference call"). But that does not mean, as the Government asserts, that Judge Randolph reserved the question whether a media defendant is entitled to greater First Amendment protection than a non-media defendant. To the contrary, as noted in the text, Judge Randolph

(continued...)

point in this litigation (and *still* does not suggest, *see* Gov't Br. 13) that there is any basis for affording the media greater free speech rights than private individuals.

Second, the Government notes that the *Bartnicki* plaintiffs sued under both subsection 2511(1)(c), which bars the *disclosure* of an unlawfully intercepted communication, and subsection 2511(1)(d), which bars the *use* of such a communication, whereas Rep. Boehner sued only under the former provision. Again, that is a distinction without a difference. *Bartnicki* did not involve any alleged use of the intercepted communication distinct from its disclosure. Because *Bartnicki* (like this case) involves an as-applied constitutional challenge, it does not implicate the constitutionality of subsection 2511(1)(d) as applied to some theoretical "use" that does not involve disclosure. Indeed, the Third Circuit expressly declined to "decide whether this statute could properly be subjected to lesser scrutiny if applied to prohibit 'uses' that do involve such 'nonspeech' elements." 200 F.3d at 121. The court simply noted that where (as there) the challenged use is a disclosure, the statutory prohibition on "use" is logically subject to the same First Amendment scrutiny as the statutory prohibition on "disclosure." *See id.* ("A statute that prohibited the 'use' of evolution theory would surely violate the First Amendment if applied to prohibit the disclosure of Charles Darwin's writings.").

Contrary to the Government's assertion, this case presents a better vehicle for this Court's review of the important First Amendment question presented than *Bartnicki* for at least three reasons.

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[1] (...continued)
expressly addressed that question, and rejected any such distinction. *See also* Pet. App. 38a (Sentelle, J., dissenting) ("[A]s the court holds today that the state can punish the release by McDermott based on the manner in which his source obtained that information, in a later day the state can burden the publishers of newspapers and the broadcasters of television and radio on the same basis.").

First, as noted above, the critical legal issue in both cases—the appropriate First Amendment analysis and level of judicial scrutiny—was *not* dispositive in *Bartnicki*, where both the majority and the dissent *agreed* on the law, and simply disagreed on the application of law to fact. In this case, in contrast, all three judges disagreed over the appropriate First Amendment analysis, and the majority and the dissent disagreed in particular over the appropriate level of scrutiny. (Judges Randolph and Ginsburg concluded that intermediate scrutiny applied and was satisfied; Judge Sentelle concluded that strict scrutiny applied and was not satisfied.) Those issues, accordingly, are potentially dispositive here. It would make little sense for this Court to pass over this case in favor of another case in which resolution of the critical legal issues made no difference in the result below.

Second, *Bartnicki* does not present the question deemed critical by Judge Ginsburg in this case: whether someone who allegedly received unlawfully intercepted information directly from the interceptor "lawfully obtained" that information. *See* Pet. App. 32a. (In *Bartnicki*, in contrast to this case, the unlawfully intercepted information was dropped off anonymously by the interceptor. *See* 200 F.3d at 113.) To the extent that this factual distinction has any First Amendment implications (and the *Bartnicki* court appeared to believe that it did, *see* 200 F.3d at 128-29), *Bartnicki* appears to involve the more idiosyncratic fact pattern. *See, e.g., Peavy v. Harman*, 37 F. Supp. 2d 495, 503 (N.D. Tex. 1999) (unlawfully intercepted tape received directly from interceptor), *appeal pending* (5th Cir. Nos. 99-10272, 10303); *Keller v. Aymond*, 722 So. 2d 1224, 1226 (La. App. 1998) (same), *cert. denied*, 120 S. Ct. 397 (1999).

Third, *Bartnicki* involves a conversation among private individuals allegedly disclosed by a private individual, whereas this case involves a conversation among public officials allegedly disclosed by a public official. Although, as the petition points out (and the Government emphasizes, *see* Gov't

Br. 14), both cases involve the disclosure of information on matters of "public concern," the information at issue here involves *more* than just a matter of public concern: it involves apparent official misconduct by the Speaker of the United States House of Representatives. As this Court has recognized, "the publication of information relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the *core* of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (emphasis added). If the disclosure of such information can be punished by a political opponent, then the protections of the First Amendment are more illusory than real.

To be sure, all parties here agree that "'*Bartnicki* is indistinguishable from this case,'" Gov't Br. 15 (quoting Pet. 23), on the core issue whether the First Amendment allows a person to be punished for disclosing truthful information on a matter of public concern merely because *someone else* previously obtained that information unlawfully. But that does not mean that there are no distinctions in the facts or the decisions below that render this case the better vehicle for this Court's consideration of that important issue. Indeed, both Rep. McDermott and Rep. Boehner—who agree on virtually nothing else in this lawsuit—agree that this case warrants review. The Government's desire to obtain review of its forthcoming petition in *Bartnicki* is no reason for the Court to pass over this petition. The Government can just as easily present its arguments in defense of the challenged statute as a respondent in this case than as a petitioner in *Bartnicki*.[2]

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[2] And, to the extent that *Bartnicki* is also deemed worthy of review, this Court could always grant both cases and consolidate them. The Court has often followed that approach where, as here, cases arrive virtually simultaneously from different circuits presenting a common legal issue in slightly different factual contexts. *See, e.g., Wilson v. Layne*, 525 U.S. 981 (1998) (granting petition and consolidating with *Hanlon v. Berger*); *Muscarello v. United States*, 522 U.S. 1023 (1997) (granting petition and consolidating with *Cleveland v. United States*); *United States v. Ursery*, 516

(continued...)

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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[2] (...continued)
U.S. 1070 (1996) (granting petition and consolidating with *United States v. $405,089.23 in United States Currency*); *Landgraf v. USI Film Prods.*, 507 U.S. 908 (1993) (granting petition and consolidating with *Rivers v. Roadway Express, Inc.*).